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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1064

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner herein respectfully moves this Court for an order (1) vacating the Court's denial of its petition for a writ of certiorari, entered on March 2, 1970, and (2) granting the petition. As grounds for this motion, petitioner states the following:

1. *The decision of this Court in H. K. Porter Company v. N.L.R.B., No. 230, Oct. Term 1969.*

On March 2, 1970, this Court issued its decision in *H. K. Porter Company* v. *N.L.R.B.*, No. 230, Oct. Term 1969, reversing and remanding that case to the Court of Appeals. In doing so, it laid down and defined further the rules of law regarding the duty to bargain and delimiting the scope of the Labor Board's power over the collective bargaining process under the National Labor Relations Act, as amended ("the Act"). The rule enunciated and followed in the case at bar conflicts in numerous respects with that followed in *H. K. Porter.*

Thus, this Court stated that (1) a fundamental policy underlying the Act is "freedom of contract," (2) the Board is unauthorized, "either directly or indirectly [to] compel concessions" in bargaining and (3) the Act does not forbid "an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." The Court of Appeals in the case at bar, however, condemned a bargaining policy which, in effect, did no more than express and emphasize (a) a willingness by the employer to rely ultimately on its economic strength, if need be, to obtain the acceptance of an offer which it believed was fair and right and (b) its determination to make no further concessions in bargaining than were contained in and thereafter added to that offer solely because of a threat of a strike by the union.

But this Court's majority in *H. K. Porter* denied *any* requirement of concession under the Act. Even the dissenting justices saw the ruling principle of good faith bargaining as being a desire to reach an agreement and the limit of

the Board's authority as "restricted to the clear case where the refusal [to grant a concession] is aimed solely at avoidance of *any* agreement." (Emphasis ours.) The case at bar falls clearly outside this highly restricted area of Board regulatory authority over collective bargaining (see Petition 12-16).

A further conflict: At the heart of the Court of Appeals' condemnation was the finding that the Company's bargaining policy when combined with publication thereof to its employees somehow tended to inhibit concessions in bargaining and made the Union appear "useless" and "powerless." Counsel for the Union herein described his view of the impact of this Court's denial of certiorari on March 2, 1970, in the following terms:

> "The Supreme Court has ended any doubt that may have existed about the unlawfulness of Boulwarism, the policy of take-it-or-leave-it negotiating, buttressed by a communications system designed to establish in the minds of the membership the *finality* of the company's offer and the *uselessness of the union.*" * (Emphasis ours.)

The concept that expressions to employees of an employer's resolution in bargaining may be lawfully curtailed or forbidden as presenting a union as "useless," however, is at odds with the decision in *H. K. Porter*. That decision permits the employer to refuse a checkoff even where such refusal was found to have been grounded on a resolve not to "aid and comfort the union." The notion that an employer need assume the burden of maintaining a union's prestige was also rejected by the Court of Ap-

* The full text of the statement is annexed hereto.

peals for the Seventh Circuit in *N.L.R.B.* v. *Bradley Washfountain Co.*, 192 F.2d 144, 151 (1951):

> "It was not necessary of course that respondent praise the Union for, in the words of Mr. Justice Rutledge in a concurring opinion in May Department Stores v. N.L.R.B., 326 U.S. 376, 66 S. Ct. 203, 216, 90 L. Ed. 145 'Nothing in the Act requires an employer to maintain a union's prestige or give it credit for originating all proposals which may have some future effect upon his relation with his employees. Section 8(1) forbids interference, coercion and restraint upon employees, in the exercise of their rights, not the mere failure of the employer to magnify the union's influence.'"

2. *The vague limitations on the employer's right of free speech contained in the decision below.*

As evidenced by the counsel for the Union's statement annexed hereto, the decision below has been read as barring communications by an employer to his employees of its views as to "the finality of the company's offer." If the First Amendment and Section 8(c) permit of limitations on the expression of such views by an employer to his employees, their perimeters should be described by this Court.

As the law now stands, by virtue of this case doubt has been created as to whether a party is protected in adopting and publishing a policy statement that its first offer holds back nothing intentionally for later trading (albeit will be changed if shown to be wrong in some way). Further doubt has been created and is already being fostered by the Union (see quote p. 3, *supra*) as to whether a party may make an unqualified statement of such finality after two months of collective bargaining negotiations.

3. *The pejorative "take-it-or-leave-it" label.*

The extent to which the undefined use of the "take-it-or-leave-it" label herein has already begun to lead to confusion concerning precisely what the much discussed and debated GE case stands for is evident from a recent article in the New York Law Journal (March 3, 1970). Even that sophisticated and legally oriented publication was misled by this vague indictment to read this case as one where the Company puts its best offer on the table "at the start of negotiations." Thus again is pointed up the need for an authoritative adjudication as to the limits on bargaining applicable to an employer who wishes accord but openly seeks to achieve it on terms which it sees as healthy for the future of its business and not on terms which are simply imposed by superior or overwhelming economic power.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for a writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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Nordlinger, Riegelman, Benetar & Charney
Counsel for Petitioner

Dated: March 26, 1970

CERTIFICATE OF COUNSEL

As counsel for petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

DAVID L. BENETAR
Counsel for Petitioner

APPENDIX

NEWS RELEASE

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS • AFL-CIO • CLC

PAUL JENNINGS, President • DAVID J. FITZMAURICE, Secretary-Treasurer

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FOR IMMEDIATE RELEASE
March 2, 1970

WASHINGTON--The U.S. Supreme Court's denial today of an appeal by the General Electric Co. from the Oct. 28, 1969, U.S. Court of Appeals ruling that the company's 1960 bargaining practices were illegal, has been hailed by the International Union of Electrical, Radio and Machine Workers.

"The denial action represents the Supreme Court's refusal to resurrect the corpse of 'Boulwarism,'" commented IUE General Counsel Irving Abramson.

"The Supreme Court has ended any doubt that may have existed about the unlawfulness of Boulwarism, the policy of take-it-or-leave-it negotiating, buttressed by a communications system designed to establish in the minds of the membership the finality of the company's offer and the uselessness of the union."

IUE President Paul Jennings, reaffirming his comments following the recent negotiations and settlement of the 1969-70 strike, expressed the hope that a more fruitful policy will be adopted by GE.

"We in IUE stand ready to work with GE for a better way of doing things, to make the satisfaction of human needs and the enhancement of human dignity GE's finest product," Jennings said. "This court decision can be the occasion for GE to enter a new era of full recognition of the unions of its employees and to work with them in resolving the employees' problems."

The Supreme Court's action left standing the Second Circuit Court's decision enforcing a 1964 ruling by the National Labor Relations Board that GE's Boulwarism practices were illegal as applied in 1960 contract talks.